(5)

No. 90-1844

Supreme Court, U.S.
FILED
JUL 29 1991
OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

RAY JAMES MUNN, Individually, and Ray James Munn, Administrator of the Estate of Elaine Munn, Deceased, on Behalf of the Heirs at Law and Wrongful Death Beneficiaries of Elaine Munn, Deceased,

Petitioner,

vs.

TRUDY E. ALGEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

MICHAEL W. MCCONNELL*
KENNETH S. GELLER
Mayer, Brown & Platt
190 S. LaSalle St.
Chicago, IL 60603
(312) 701-7201

THOMAS C. BERG
1212 N. LaSalle St., # 1507
Chicago, IL 60610
(312) 280-0823

PHIL ZERILLA, JR.
Martin, Zerilla & Moon
243 Adams St.
Memphis, TN 38103
(901) 525-1616

**Counsel of Record*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

CONCLUSION 6

TABLE OF AUTHORITIES

Cases *Page*

Chapman v. *California*,
386 U.S. 18 (1967) 4-5

Employment Division v. *Smith*,
110 S. Ct. 1595 (1990) 1

Frazee v. *Illinois Department of Employment Security*,
489 U.S. 829 (1989) 2

Murphy v. *ISKCON of New England, Inc.*,
409 Mass. 842, 571 N.E.2d 340 (1991) 5

Sherbert v. *Verner*,
374 U.S. 398 (1963) 2

No. 90-1844

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

RAY JAMES MUNN, Individually, and Ray James Munn, Administrator of the Estate of Elaine Munn, Deceased, on Behalf of the Heirs at Law and Wrongful Death Beneficiaries of Elaine Munn, Deceased,

Petitioner,

vs.

TRUDY E. ALGEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Nothing in the Brief in Opposition casts doubt on the importance of this case or the appropriateness of review by this Court. Indeed, respondent's defense of the judgment below only emphasizes the need for additional guidance regarding free exercise claims in the wake of *Employment Division* v. *Smith*, 110 S. Ct. 1595 (1990).

1. Respondent claims that "this Court's analysis in *Smith* clearly controls and was properly applied by the Court of Appeals" (Br. in Opp. 7). This rests on an interpretation of *Smith* that both exaggerates its impact and creates a clear conflict with *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and subsequent cases relying on *Sherbert*. This case thus offers an opportunity for this Court to clarify whether it intended, in *Smith*, to overrule the *Sherbert* line of cases, including one decision, *Frazee* v. *Illinois Department of Employment Security*, 489 U.S. 829 (1989), decided unanimously just two years ago.

As explained in the Petition (at 21-23), this case is analytically indistinguishable from *Sherbert*. In both cases, the injured party is required to mitigate damages—by taking "reasonable steps" in this case or accepting "suitable work" in *Sherbert*—and in both cases the question is whether adherence to sincere religious scruples must be treated as "reasonable" or "suitable." Respondent's attempts to distinguish the *Sherbert* line of cases do not bear scrutiny. She argues, first, that the *Sherbert* cases involved unemployment compensation (Br. in Opp. 16). But that is surely not a valid basis for distinction; the Constitution does not contain a special rule for unemployment compensation. She argues, second, that "a system of individualized exemptions" was created in *Sherbert* and not here. *Id.* That is simply incorrect. Whether work is "suitable" and whether refusal of proposed treatment is "reasonable" are both quintessentially individuated determinations. Our position—identical to the position of the Court in *Sherbert*—is that government bodies may neither second-guess the sincere religious tenets of believers (as the district court instructed the jury to do) nor refuse to extend

protections to religious reasons that are extended to strongly held personal, but nonreligious, reasons (as the court of appeals held). The judgment below is simply irreconcilable with *Sherbert*.

Respondent repeatedly mischaracterizes our claim when she states (Br. in Opp. 7) that "petitioner . . . seeks to carve out a religious exemption to the avoidable consequences rule." On the contrary, petitioner is *relying* on the avoidable consequences rule, which requires only reasonable steps by the tort victim. Our contention is that the state is not entitled to brand sincere adherence to a religious belief as unreasonable under that rule. The analogy to *Smith* would be if the law permitted the use of peyote for "good cause" and then refused to recognize the ceremonials of the Native American Church as "good cause."

2. Respondent defends the admission of cross-examination testimony regarding Jehovah's Witness beliefs on such matters as military service, flag salutes, the second coming of Christ, and the eternal damnation of non-Jehovah's Witnesses, on the theory that this evidence was relevant to the issue of sincerity. Br. in Opp. 22. This claim borders on the frivolous. The cross-examination was not about whether Mrs. Munn sincerely believed she must refuse a blood transfusion.[1] Rather, petitioner was questioned about the content of controversial beliefs wholly irrelevant to the question of blood, but highly inflammatory and prejudicial

1. Petitioner does not dispute that it would have been legitimate to direct questions to him regarding the sincerity of his wife's commitment to her beliefs—though the sincerity of one who is willing to die rather than to violate her faith could hardly be in doubt.

in front of a jury. Whether intentionally or not, these questions effectively put the Jehovah's Witness religion on trial. As the court of appeals recognized, the effect and probable purpose was to "imply that . . . because the entire religion is unreasonable, any decision made in accordance therewith is *per se* unreasonable." *Id.* at A6 n.5.

The legal question presented is how the court of appeals, having recognized (1) that the evidence was irrelevant to "any (permissible) material fact" (Pet. App. A6), (2) that the evidence was "potentially prejudicial" (*id.* at A20), and (3) that the evidence invited the jury to decide the case on unconstitutional grounds (*id.* at A6 n.5), could have held the error harmless.[2] It does not take a psychologist to predict a jury's reaction to learning that the plaintiff refuses to fight for his country or honor his flag, thinks that Christ returned to earth in 1914, and holds that the jurors, along with all other non-Jehovah's Witnesses, will go to hell.

The finding of harmlessness is attributable to the court's grossly inadequate standard of review, not appropriate to the constitutional nature of the error. See *Chapman* v.

2. This question is independent of the other questions presented. The evidentiary error affected the jury's calculation of damages for pain and suffering on the part of both petitioner and the deceased, as well as the denial of damages for wrongful death. Respondent's assertion that petitioner waived review because he "did not complain of this verdict to the Fifth Circuit" (Br. in Opp. 26-27) is without foundation. The first section of petitioner's brief in the court of appeals addressed the evidentiary error and argued that the error prejudiced the jury against him. Br. of Plaintiffs-Appellants, at 13-17.

California, 386 U.S. 18 (1967).[3] Where the religious practices and beliefs of a party are at issue in a case, the opposing party cannot be allowed to sway the jury by introduction of inflammatory information regarding the religion's strange and unpopular beliefs. So egregious an error should have produced an automatic reversal.

A recent decision of the Supreme Judicial Court of Massachusetts underscores the importance of this issue and the need for review. In *Murphy* v. *ISKCON of New England, Inc.*, 409 Mass. 842, 571 N.E.2d 340 (1991), the court reversed a jury verdict in favor of the plaintiffs on the ground that prejudicial evidence regarding the defendants' religious practices and beliefs "may have infected the jury's consideration" of the claims, even though that evidence did not "bear directly on these issues." 571 N.E.2d at 350 n.13. The decision below is plainly inconsistent with *Murphy*. The court below required an affirmative showing that the jury's verdict was based on the improper evidence. See Pet. App. A9 ("there is no indication that the jury was using her refusal to take blood as a pretext for expressing its possible distaste for Jehovah's Witnesses"). In *Murphy*, the Supreme Judicial Court, which relied solely on federal constitutional cases, held that the mere "possibility" that the verdict "*may* have infected the jury's consideration" necessitates reversal. This Court's guidance is needed to determine when a verdict must be reversed on the ground that evidence was admitted which invited the jury to punish a party for unpopular religious beliefs.

3. Respondent makes no response to our argument (Pet. 29-30) that the court of appeals should have applied the higher standard of review for constitutional error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL W. MCCONNELL*
KENNETH S. GELLER
Mayer, Brown & Platt
190 S. La Salle St.
Chicago, IL 60603
(312) 701-7201

THOMAS C. BERG
1212 N. LaSalle St., # 1507
Chicago, IL 60610
(312) 280-0823

PHIL ZERILLA, JR.
Martin, Zerilla & Moon
243 Adams St.
Memphis, TN 38103
(901) 525-1616

**Counsel of Record*

July 29, 1991